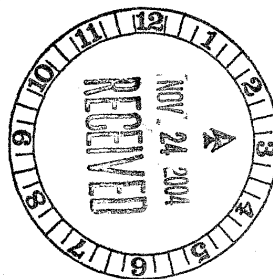


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BEFORE THE
SURFACE TRANSPORTATION BOARD



AEP TEXAS NORTH COMPANY,

Complainant,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,

Defendant.

Docket No. 41191 (Sub-No. 1)

ENTERED
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Part of
Public Record

**DEFENDANT'S OPPOSITION TO COMPLAINANT'S
PETITION TO SUPPLEMENT THE RECORD**

Defendant The Burlington Northern and Santa Fe Railway Company hereby replies in opposition to AEP Texas North Company's ("AEP Texas") November 8, 2004, Petition to Supplement the Record ("Petition"). AEP Texas now admits that the rebuttal RTC simulation it filed on July 27, 2004 was fatally flawed. It seeks the Board's permission, more than three months after rebuttal evidence was filed, to replace that flawed rebuttal evidence with an entirely new RTC simulation of the operation of a stand-alone railroad that involves a different set of trains moving over a new track configuration. There is no legal or factual basis for granting this extraordinary request.

The Board has established a bright-line rule prohibiting the introduction of new evidence in a SAC case after the close of the record if that evidence could reasonably have been introduced previously. That rule is expressly based on the need for closure in SAC cases, a concern that has led the Board in recent cases to impose strict limits on complainants' use of rebuttal. AEP Texas effectively asks that the Board ignore its concerns over closure and allow

AEP Texas to file new evidence simply because AEP Texas belatedly discovered an error in its evidence. AEP Texas' claim that its errors can be excused because it relied on flawed BNSF reply evidence is false and misleading. It is false because there is no flaw in BNSF's reply evidence – unlike AEP Texas, BNSF carefully produced a train list for its RTC simulation that corresponds directly and accurately to its SAC traffic assumptions. AEP Texas' claim is also false because it is clear that the errors in its rebuttal RTC simulation were based on its own consultants' mistakes and had nothing to do with supposed flaws in BNSF's reply evidence. The flaws in AEP Texas' simulation were obvious – regardless of how they came about – and they should have been detected with a minimum of effort.

AEP Texas cannot expect the Board to give it a third chance to file SAC evidence in this case by fabricating supposed errors in BNSF's reply evidence and by manufacturing excuses about the source of the mistakes in its own rebuttal evidence. The Board must give effect to its concerns over closure and it should not countenance AEP Texas' attempt to further prolong this proceeding. The Board should recognize AEP Texas' misdirection for what it is and deny the petition as baseless.

I. Background

On July 27, 2004, AEP Texas filed its rebuttal evidence, supposedly completing its evidentiary submissions in this SAC proceeding. Its rebuttal evidence contained several major changes in the SAC assumptions contained in its March 1, 2004 opening evidence. Those changes included a new simulation of the operations of its SARR using the Rail Traffic Controller (RTC) analysis. AEP Texas' RTC simulation was central to its traffic and operating assumptions on both opening and rebuttal. In both its opening and rebuttal presentations, AEP Texas sought to include a large volume of traffic in the SARR traffic group that originates at southern PRB mine origins and is assumed to be rerouted from the real-world route of movement

to a longer SARR route. AEP Texas purported to use the RTC simulation to demonstrate that notwithstanding the longer route, the service provided by the SARR would be as good as that provided by the real world BNSF. On the operating issues, AEP Texas used the output of the RTC simulation to produce operating statistics from which several operating costs were derived.

On September 9, 2004, BNSF filed a motion to strike AEP Texas' rebuttal evidence in several areas where that evidence exceeded the scope of permissible rebuttal. Among other things, BNSF requested the Board to strike AEP Texas' submission of a new and substantially modified RTC analysis. As BNSF explained in its motion to strike, AEP Texas acknowledged on rebuttal that its opening RTC analysis was flawed in several respects. However, instead of accepting BNSF's evidence in areas where AEP Texas admitted that its RTC evidence was deficient, AEP Texas submitted new assumptions and new methodologies in violation of the Board's rules governing rebuttal evidence. BNSF Motion to Strike, at 13-20 (filed Sept. 9, 2004).

On October 20, 2004, AEP Texas replied to BNSF's motion to strike. On the RTC issue, AEP Texas defended its presentation of a new RTC analysis on rebuttal as an appropriate response to evidence that BNSF presented on reply. However, it also advised the Board that it had confirmed BNSF's claim in the motion to strike that AEP Texas' rebuttal RTC analysis was flawed because it failed to include 17 percent of the trains that should have been included in the model. AEP Texas stated that its consultants were in the process of conducting yet another RTC simulation and that it planned to submit that new simulation when it was complete.

On November 8, 2004, AEP Texas filed its proposed supplemental evidence. This new evidence added nearly 70 miles of track, changed operating statistics to reflect new transit times, changed construction and other costs due to the additional track, and included a new DCF

analysis. Accompanying its revised evidence was the Petition to Supplement the Record that is the subject of this reply.

II. The Board Does Not Allow A Party To Submit New Evidence After The Close Of The Record If That Evidence Could Have Been Submitted Earlier

The Board clearly set forth in *Duke Energy Corp. v. Norfolk Southern Railway Co.*, STB Docket No. 42069, slip. op. at 2 (served March 25, 2003), both the stringent standard applicable to petitions to submit new evidence after the close of the record and the reason that such a stringent standard is required:

The record must close at some point. Absent a clearly defined cut-off point that is observed by all, one party or the other could always point to some new piece of data to bolster its arguments. Both parties in a rate reasonableness proceeding have ample opportunity to support their case in their scheduled evidentiary submissions. If a party wishes to introduce further material at a later stage, it must file a petition to supplement the record. Such a petition should show that the information sought to be introduced is central to the petitioning party's case, could not reasonably have been introduced earlier, and would materially influence the outcome of the proceeding.

Here, both parties agree that the RTC simulation is central to AEP Texas' case and that the simulation has a material influence on the outcome of the case. But a complainant that has submitted deficient evidence on a critical aspect of its SAC case is not entitled to multiple attempts to get its evidence right. Rather, each party is expected to submit competent evidence as part of the regular opening/reply/rebuttal sequence of pleadings. As the Board stated in *Duke v. NS*, "[b]oth parties . . . have ample opportunity to support their case in their scheduled evidentiary submissions." Thus, new evidence, even on critical issues that materially influence the outcome of a case, is strictly prohibited unless that new evidence "could not reasonably have been introduced earlier." AEP Texas cannot meet this standard.

Everything AEP Texas seeks to submit now could have been submitted at the rebuttal stage. AEP Texas cannot point to a single piece of evidence that it has now but did not have when it was preparing its rebuttal evidence. This fact alone disposes of AEP Texas' petition and mandates denial.

III. AEP Texas' Submission of New Evidence Cannot Be Justified By Supposed Defects In BNSF's Reply Evidence

AEP Texas' Petition completely ignores the governing legal standard. Instead, it presents an argument that the defects in AEP Texas' prior rebuttal evidence are not the fault of its own consultants but rather are the fault of BNSF because BNSF allegedly did not include enough trains in its reply RTC simulation. From this faulty premise, AEP Texas draws two conclusions: (1) both the BNSF and the AEP Texas simulation evidence is incorrect, so the Board must allow the submission of new evidence or it will have no valid simulation evidence to rely upon; and (2) AEP Texas should be allowed to submit new evidence if it can shift the blame for the defects in its own evidence to someone else. Both conclusions are without any legal support and they are both wrong.

A. BNSF's Reply Evidence is Complete and Accurate

There is no error in the train list BNSF used in its reply RTC simulation. The development of this list is clear from BNSF's reply electronic workpapers. BNSF determined which of the real-world 2002 trains were part of its affirmative traffic group (described in detail in Section III.A of the Reply Narrative). These year-2002 trains are listed in BNSF Reply electronic workpaper "Simulation Trains – BNSF Affirmative.xls," worksheet "2002-2020 Train List." Trains for 2020 were then determined by applying to each 2002 train growth factors calculated using BNSF's growth assumptions. *Id.*, columns G through K. This process produced the correct number of trains for the entire year 2020 because the growth factors are based on the

number of net tons forecast to be transported in 2020.¹ As described in the “Notes” worksheet of BNSF Reply electronic workpaper “copkstat BNSF Affirmative.xls,” trains for the simulation period were then determined by: (1) deleting all train symbols not used in the BNSF traffic group from the AEP Texas list of simulation trains; (2) adding additional train symbols for trains not included by AEP Texas that would move during the simulation period according to BNSF’s assumptions; and (3) referring to BNSF electronic workpaper “Simulation Trains – BNSF Affirmative.xls,” worksheet “2002-2020 Train List,” to determine the number of trains for each train symbol that would move in 2020 during the simulation period. This exercise produced a total of 500 loaded coal trains that were run through the BNSF reply RTC simulation.

AEP Texas offers several critiques of BNSF’s train list. AEP Texas asserts, based on an incorrect interpretation of BNSF Reply electronic workpaper “BNSF Reply Final-AEP2.ROUTE,” that BNSF simulated only 481 loaded coal trains in its reply RTC model rather than the 500 in the train list.² The 481 trains reported in the ROUTE file are only those which completed their cycle during the simulation period. If a loaded train began but did not complete its cycle during the simulation, it does not appear in the ROUTE file. If AEP Texas’ consultants had bothered to examine BNSF’s reply RTC simulation, they would have seen in the animation of the RTC simulation that the 19 supposedly missing loaded coal trains do, in fact, run in the simulation.

¹ Growth factors are calculated in BNSF Reply electronic workpaper “Simulation Trains – BNSF Affirmative.xls,” worksheet “BNSF Affirmative Reply Growth,” which shows in cell O439 a total of 166,152,328 net tons of coal transported in 2020. This tonnage figure is the same as the net tonnage forecast used by BNSF for 2020 elsewhere in its Reply evidence. See BNSF Reply Exh. III-A 6, at 6.

² Verified Statement of Paul H. Reistrup (“Reistrup V.S.”), at 19, filed Oct. 20, 2004, as Attachment 2 to AEP Texas’ Reply to Motion to Strike.

AEP Texas also argues that the BNSF train list contains 25 trains that should not be there because they were not included in AEP Texas' opening train list. Reistrup V.S. at 19. But the fact that the 25 trains were not in AEP Texas' opening train list is irrelevant. The 25 trains are included in BNSF's train list because they are the product of BNSF's traffic growth assumptions, which differ from AEP Texas' traffic growth assumptions. The 25 trains at issue were identified through the same process, described above, that produced the entire list of 500 loaded coal trains. BNSF's reply workpapers demonstrate that BNSF properly developed a train list that represented BNSF's peak year traffic group, incorporating BNSF's traffic growth assumptions, for the simulation period. AEP Texas cannot fault BNSF for adhering to BNSF's traffic growth assumptions, which differed from AEP Texas' traffic growth assumptions, and for creating a train list that reflects BNSF's assumptions rather than AEP Texas' assumptions.

Finally, AEP Texas argues, on the basis of faulty arithmetic, that BNSF's simulation should have included more than 500 loaded coal trains. Reistrup V.S. at 20. AEP Texas claims that the BNSF list of 500 trains must be deficient because the number of trains in the "Removed" worksheet of BNSF Reply electronic workpaper "copkstat BNSF Affirmative.xls," (183), plus the number of trains in BNSF's train list (500) do not add to 710, the number of loaded coal trains AEP Texas intended to model as set forth in AEP Texas Rebuttal Exh. III-B-5. Of course the numbers do not add to 710; they are not supposed to. As the discussion above indicates, the "Notes" worksheet in BNSF Reply electronic workpaper "copkstat BNSF Affirmative.xls" clearly states that the affirmative BNSF train list was *not* created by simply removing trains from the AEP Texas train list used on opening. Rather, the 500 trains included in the BNSF list are the product of removing some trains from the AEP Texas list, adding other trains that were not included in the AEP list (but are included in AEP Texas' traffic group) and applying independent

traffic growth assumptions to all of the trains in the BNSF traffic group to derive a total number of trains for the simulation period in 2020. AEP Texas' faulty arithmetic focuses solely on the removal of trains from AEP Texas' train list and ignores the other steps in the generation of the BNSF train list. BNSF's workpapers demonstrate that BNSF properly arrived at the 500 trains in its train list.³

In short, AEP Texas' claim that the record does not contain a valid RTC simulation is wrong. BNSF's RTC simulation is valid and reliable and it is based on an accurate train list that properly reflects the level of traffic that BNSF projected for the SARR. To the extent AEP Texas seeks permission to submit new evidence based on its claim that there is no valid RTC evidence in the record, the petition should therefore be denied.

B. While It Is Impossible To Determine Exactly What Went Wrong In AEP Texas' Development Of A Train List, It Is Clear That The Errors Committed Were Its Own

AEP Texas seeks to shift the blame for its errors in the development of a train list to BNSF. AEP Texas asserts, without ever establishing a direct linkage, that the deficiencies in its train list are the result of the supposed problems with the BNSF train list just discussed. AEP Texas, however, never offers a coherent or intelligible explanation of how it developed the train list it used in its rebuttal evidence. AEP Texas creates the impression that it took the 500 trains from the list for BNSF's affirmative case and added to those trains a group of trains contained in a worksheet titled "Removed" which is part of the "copkstat BNSF Affirmative.xls," spreadsheet

³ AEP Texas also objects to how BNSF modeled unit trains to power plants local to the SARR. BNSF did not continuously cycle unit trains to local plants because doing so would have delivered too much coal to those plants and would have overstated traffic (thereby requiring more track capacity). BNSF disagrees that the approach followed by AEP Texas is correct. In any case, AEP Texas does not claim that the BNSF approach on this issue has any bearing on whether AEP Texas made errors that could not have been corrected before it submitted its rebuttal evidence.

in which BNSF developed its list of 500 trains. *See, e.g.*, Complainant's Motion for Extension of Time, at 3 (filed Sept. 21, 2004); Reistrup V.S. at 19. Why AEP Texas would have assumed that such a procedure made sense is a mystery. For the reasons just explained, any attempt to follow such a procedure would not produce the result AEP Texas desired because it would ignore differences between the base traffic assumptions and traffic growth assumptions of the two parties.

In any case, it is abundantly clear that, notwithstanding the impression it creates, AEP Texas did not prepare its rebuttal train list by taking BNSF's 500 trains and adding to those trains the trains in the "Removed" worksheet. As BNSF demonstrated in its Motion to Strike, more than half the trains missing from the AEP Texas rebuttal simulation are trains destined for Georgia Power's Scherer plant. AEP Texas did not include a single Georgia Power train in its simulation. *See* BNSF Motion to Strike electronic workpaper "AEPTX Rebuttal RTC Failings.xls," worksheet "Exh III-B-5 vs AEPTX RTC," cell U11. Had AEP Texas simply added the trains from the "Removed" worksheet, its simulation would have included the Georgia Power trains because the Georgia Power trains are clearly listed in that worksheet.⁴ These trains were clearly excluded from the BNSF traffic group, BNSF Reply Nar. at III.A-34 to 39, so only AEP Texas could be at fault for failing to generate a train list that included them. Moreover,

There is no way to know what process AEP Texas actually followed when it developed its defective train list on rebuttal. What is clear is that AEP Texas' rebuttal RTC evidence was fatally deficient, as shown both by its own admission and by the proof submitted with BNSF's Motion to Strike. What is also clear is that any errors in AEP Texas' derivation of its train list stemmed not from problems with the BNSF train list (there were not any), but from the inability

⁴ *See* BNSF Reply electronic workpaper "copkstat BNSF Affirmative.xls," worksheet "Removed," lines 88 through 147.

of AEP Texas' consultants to develop a train list that matched the trains specified in AEP Texas' Rebuttal Exh. III-B-5. AEP Texas' collateral assaults on BNSF's reply evidence are merely a subterfuge to disguise the failings in its own evidence. The simple truth is that AEP Texas did not create a list that permitted it to model the right trains and the right number of trains in its rebuttal RTC simulation. AEP Texas' mistake leaves a major hole in its evidence. That deficiency does not justify AEP Texas' submission of new evidence.

C. AEP Texas Has No Excuse For Failing To Submit Accurate RTC Evidence Prior To The Close Of The Record

Even if it were possible to know how AEP Texas' consultants produced an inaccurate train list and a flawed RTC simulation on rebuttal, it would not matter in deciding the issue addressed in this pleading, which is whether AEP Texas should be permitted to correct its deficient evidence long after the record was supposed to close. The answer to that question is no. The Board's standard for submission of new evidence clearly states that such evidence is allowed only if it "could not reasonably have been introduced earlier." AEP Texas had exactly the same capability to prepare its proposed new evidence at the rebuttal stage as it possesses now. The only new development since AEP Texas filed its rebuttal evidence is that BNSF has pointed out that AEP Texas' evidence contains major flaws.

AEP Texas had all the data it needed when it was preparing its rebuttal evidence to submit an accurate train list and a reliable RTC simulation. AEP Texas clearly knew at the rebuttal stage what trains it wanted to model. It listed those trains in its Rebuttal Exh. III-B-5. AEP Texas had the ability and the responsibility to match the list it actually used in the RTC simulation to the list that it represented to the Board that it was using. Its claim that it has now done so, without the benefit of any additional data, demonstrates that it could have done the same thing on rebuttal. Moreover, AEP Texas could easily have ascertained that its rebuttal RTC

simulation was flawed before it was filed simply by counting how many trains were run through the simulation. AEP Texas clearly knows how to perform such a check since doing so formed part of its belated attack on BNSF's reply evidence. *See* Reistrup V.S. at 19. AEP Texas could also easily have determined that its simulated traffic included no Georgia Power trains. Either check would have revealed the serious flaws now at issue. AEP Texas simply did not exercise the diligence necessary to determine that its evidence was valid.

AEP Texas also has no excuse for submitting a new critique of BNSF's reply evidence after the record closed. The proper time for any critique of BNSF's reply evidence was the rebuttal stage. There is absolutely no reason that AEP Texas could not have presented the analysis it now seeks to introduce at the rebuttal stage. AEP Texas has been in possession of all of the data it now possesses since BNSF filed reply evidence on May 24, 2004, more than five months ago. AEP Texas does not contend otherwise. Rather, it says it never attempted to critique BNSF's reply evidence because it "had no reason at the time to question the completeness of BNSF's RTC train file."⁵ In other words, it was not that AEP Texas could not have checked BNSF's evidence at the proper time, it was that AEP Texas' consultants never bothered to do so. By performing an analysis now, AEP Texas effectively demonstrates that the same exercise could have been performed at the proper, rebuttal stage. A showing of a lack of diligence by AEP Texas' consultants does not demonstrate that the new evidence "could not reasonably have been introduced earlier."

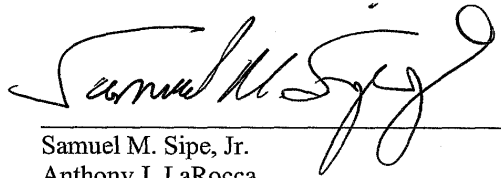
IV. Conclusion

If the Board's standard for permitting new evidence is to have meaning, it must be applied to bar the submission of new evidence where the moving party belatedly discovered a

⁵ Reistrup V.S. at 18.

mistake in its evidence. The argument that AEP Texas should not be held responsible for mistakes in its evidence is nothing more than a smokescreen intended to divert attention from the applicable standard. AEP Texas could and should have introduced competent evidence at the rebuttal stage. No one prevented it from doing so. The Board should not permit it to submit yet another round of evidence now.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Samuel M. Sipe, Jr.", written over a horizontal line.

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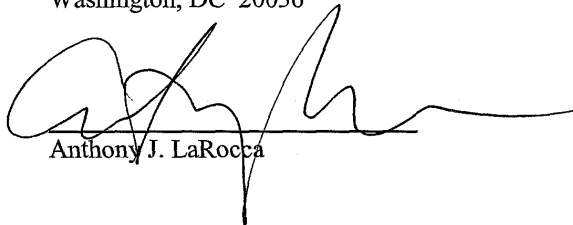
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November 24, 2004

CERTIFICATE OF SERVICE

I hereby certify that this 24th day of November, 2004, I served a copy of the foregoing
Opposition to Petition to Supplement the Record on the following by hand delivery:

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